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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

EDDIE LEE WEATHERSBY,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

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TOPICAL INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	8
I The Prosecutor's Purposeful and Systematic Exclusion of Sixteen Black People from Petitioner's Petit Jury by the Exercise of Peremptory Challenges Denied Petitioner's Sixth Amendment Right to a Jury Comprising a Fair Cross-Section of the Community. No Court, Including this One, Has Yet Measured the Justification for the Unfettered Exercise of Prosecution Peremptory Challenges Against a Defendant's Sixth Amendment Rights. The Time is Ripe for this Court to Do So	8
II The Prosecutor's Purposeful and Systematic Exclusion of Sixteen Black People from Petitioner's Petit Jury by the Exercise of Peremptory Challenges Denied Petitioner the Equal Protection of the Laws. The Time is Ripe for Consideration of Whether *Swain* v. *Alabama* Should Be Overruled	17
CONCLUSION	21

TABLE OF AUTHORITIES CITED

Cases

	Page
Albemarle Paper Co. v. Moody 422 U.S. 405 (1975)	20
Alexander v. Louisiana 405 U.S. 625 (1972)	17, 18, 19
Ballew v. Georgia 435 U.S. 223 (1978)	11
Carter v. Jury Comm'n of Greene County 396 U.S. 320 (1970)	19, 20
Castaneda v. Partida 430 U.S. 482 (1977)	19
Commonwealth v. Soares _____, Mass. _____, 387 N.E.2d 499 (Mar. 8, 1979)	13
Duncan v. Louisiana 391 U.S. 145 (1968)	8, 9, 13
Duren v. Missouri _____ U.S. _____ [58 L.Ed.2d 579] (1979)	11, 15
Int'l Brotherhood of Teamsters v. United States 431 U.S. 324 (1977)	20
Irvin v. Dowd 366 U.S. 717 (1961)	9
Jones v. Georgia 389 U.S. 23 (1967)	20
Mayor of Philadelphia v. Educational Equality League 415 U.S. 605 (1973)	20
McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973)	20
Murphy v. Florida 421 U.S. 794 (1975)	9
People v. Allen 23 Cal.3d 286 (1979)	13

TABLE OF AUTHORITIES CITED (Cont'd)

Cases

	Page
People v. Browning 79 Cal.App.3d 320 (1978)	4, 5
People v. Johnson 22 Cal.3d 296 (1978)	13
People v. Wheeler 22 Cal.3d 258 (1978)	passim
Peters v. Kiff 407 U.S. 493 (1972)	9
Rose v. Mitchell _____ U.S. _____ [47 U.S.L.W. 4948] (July 2, 1979)	19, 21
Simms v. Georgia 389 U.S. 404 (1967)	20
State v. Brown _____ La. _____, 371 So.2d 751 (May 21, 1979)	13
Strauder v. West Virginia 100 U.S. 303 (1880)	13, 21
Swain v. Alabama 380 U.S. 202 (1965)	passim
Taylor v. Louisiana 419 U.S. 522 (1974)	passim
Turner v. Fouche 396 U.S. 346 (1970)	19
Whitus v. Georgia 385 U.S. 545 (1967)	17, 18, 19
Willis v. Georgia No. 79-5142, pet. for cert. docketed July 27, 1979	2

Statutes

Penal Code section 1067–1070.5	3
1069	3
United States Code 28 U.S.C. Section 1257(3)	2

TABLE OF AUTHORITIES CITED (Cont'd)

Constitutional Provisions

	Page
California Constitution:	
Article I, section 16	12, 13
United States Constitution:	
Sixth Amendment	passim
Fourteenth Amendment	passim

Court Rules

California Rules of Court 25	2
28	2

Articles

Babcock, *Voir Dire: Preserving "Its Wonderful Power"* 27 Stan. L.Rev. 545 (1975)	9
Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process* 18 St. Louis U.L.J. 662 (1974)	14
Kuhn, *Jury Discrimination: The Next Phase* 41 So.Cal. L.Rev. 235 (1968)	4
Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries* 86 Yale L.J. 1715 (1977)	12
Note, *Use of Peremptory Challenges to Exclude Negroes from Trial Jury* 79 Harv. L.Rev. 135 (1965)	13
Zeisel, *Six Man Juries, Majority Verdicts—What Difference Do They Make?* 5 Occasional Papers from the University of Chicago Law School (1973)	10

Texts

Kalven and Zeisel, The American Jury (1966)	10
Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels (1977)	9

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

Petitioner EDDIE LEE WEATHERSBY respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four.[1] The Judgment became final and was entered on August 1, 1979, following the issuance of an opinion on June 6, 1979.

OPINIONS BELOW

The unreported opinion of the Court of Appeal affirming petitioner's murder conviction was filed on June 6, 1979, and is reproduced as Appendix A hereto. The order of the California Supreme Court denying discre-

[1] The Court of Appeal of the State of California, First Appellate District, Division Four, is hereafter referred to as the "Court of Appeal."

tionary review was entered on August 1, 1979, and is reproduced as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The decision of the Court of Appeal became final on August 1, 1979, when the California Supreme Court denied discretionary review. Rules 25 and 28, California Rules of Court.

QUESTIONS PRESENTED

1. Did the exclusion of sixteen black persons from petitioner's petit jury by the prosecutor's exercise of peremptory challenges, resulting in petitioner's trial and conviction by an all-white jury, violate, or make out a *prima facie* case of violation of, petitioner's Sixth Amendment right to an impartial jury comprising a fair cross-section of the community?

2. Did the exclusion of sixteen black persons from petitioner's petit jury by the prosecutor's exercise of peremptory challenges, resulting in petitioner's trial and conviction by an all-white jury, violate, or make out a *prima facie* case of violation of, petitioner's Fourteenth Amendment right to equal protection of the laws (*i.e.*, to be free from invidious racial discrimination), and should *Swain* v. *Alabama,* 380 U.S. 202 (1965), be overruled?[2]

[2] Similar issues involving the jury selection system of the State of Georgia are pending in *Willis* v. *Georgia,* No. 79-5143, pet. for cert. docketed July 27, 1979, a death penalty case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The Fourteenth Amendment provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 1069 provides in part:

"A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the Court must exclude him."[3]

STATEMENT OF THE CASE

Petitioner was one of several co-defendants charged and convicted of the murder of Lester Nelson at the Santa Rita Rehabilitation Facility.[4] The prosecution's theory was that the killing of Nelson was in revenge of Nelson's heroin-overdose murder of a woman named Nira Bostic, a friend of petitioner and co-defendant Tucker (the Coroner concluded that Ms. Bostic's death

[3] *See generally* California Penal Code sections 1067–1070.5.

[4] Santa Rita is the county jail of Alameda County, California, the county in which the City of Oakland is situated.

was accidental); that the killing had been arranged by one Pepper Terry who had fathered a child by Ms. Bostic; that petitioner and co-defendant Tucker stabbed and thereby injured Nelson in the shower-room of Compound 3-C at Santa Rita; that the actual killing blows were struck by co-defendant Wyatt who repeatedly bludgeoned Nelson's head with a mop-wringer (Wyatt was acquitted); and that co-defendant Browning—as godfather of the Black Guerrilla Family ("BGF"), a prison gang which allegedly terrorizes inmates in penal institutions—ordered, master-minded, and oversaw the killing (Browning's murder conviction was subsequently reversed on appeal, *see People* v. *Browning,* 79 Cal.App.3d 320 (1978)). The prosecution's evidence was weak and suspect; virtually all prosecution "eyewitnesses" received promises of leniency or dismissals of numerous serious charges pending against them in exchange for their testimony.[5]

[5] For example, the two most damning prosecution "eyewitnesses" were Harry Guidry and William Hackney. When Guidry testified before the grand jury in this case, he was permitted to enter a plea bargain with the district attorney in another case pursuant to which the following charges were dismissed: sale of barbiturates, possession of barbiturates for sale, four counts of forcible rape, robbery, sodomy, two counts of false imprisonment, two counts of assault with intent to commit rape, attempted murder, two counts of forced oral copulation, kidnapping for purposes of robbery with the intentional infliction of great bodily injury (punishable by life imprisonment in California), and arming clauses charged with respect to the first nine counts in the information. In addition, allegations of prior felony convictions were dismissed pursuant to the bargain and the first-degree robbery of which Guidry was convicted was reduced to second-degree; Guidry was also promised that he would be permitted to serve his time out of state. With respect to other benefits received by Guidry in exchange for his testimony, *see generally* Reporter's Transcript 1470–1473.

Considerable evidence was presented at trial that prosecution witness Hackney participated in and in fact oversaw the Nelson killing. Hackney was granted complete transactional immunity from prosecution for the Nelson killing in exchange for his testimony. In addition, the district attorney had promised to dismiss existing charges pending against Hackney, including forcible rape, forced oral copulation, receiving stolen property, and possession of a weapon by an ex-felon.

The remaining prosecution "eyewitnesses" were also promised benefits by the district attorney in exchange for their testimony; they included Jonathan Pugh, Albert Bell, John Anjell, and Pepper Terry.

The case was a close one. The jury deliberated more than 24 hours over a period of four days before returning petitioner's guilty verdict. On the second day of deliberations, one juror inquired of the trial judge why there was no form for a hung jury, and on the fourth day, just 29 minutes after the verdict against petitioner was returned, the trial judge gave the *Allen* instruction for deadlocked juries which formed the basis of the reversal of co-defendant Browning's subsequent conviction. *People* v. *Browning, supra,* 79 Cal.App.3d 320 (1978).

Petitioner, a black man, contends that he was convicted not on the basis of the prosecution's evidence, all of which was of a nature and quality inherently weak and suspect, but upon an appeal to the racial fears and prejudices of the all-white jury from which sixteen black persons were systematically excluded by the prosecutor's exercise of peremptory challenges. During jury selection, 134 prospective jurors were called into the jury box. Of those, nineteen were black. Three black persons were excused for cause, and the remaining sixteen were peremptorily challenged by prosecutor Anderson. The prosecution exercised a total of 34 peremptory challenges, and on no occasion when a black person was seated in the jury box did the prosecution pass its challenge.

Petitioner repeatedly objected to the prosecutor's systematic exclusion of black persons from the jury, but each such objection was denied by the trial court. On the third occasion when the objection was made, defense counsel noted that prosecutor Anderson had winked at

the defendants several times after peremptorily challenging black persons; the trial court admonished Anderson to desist from that conduct. After the fourth such objection was made, Anderson attempted to justify his purposeful exclusion of blacks on the basis that the race of those jurors would somehow make them more susceptible to intimidation, at which point petitioner's counsel observed that the prosecutor's statement was a clear admission of systematic exclusion based on group bias. Anderson's purported justification is belied by the fact that he subsequently permitted a black man to serve as third alternate juror. That alternate juror never participated in the deliberations resulting in petitioner's conviction.

At trial, the jury was inflamed by references to the Black Guerrilla Family ("BGF"); a 1974 San Quentin murder allegedly involving the BGF and co-defendant Browning; Donald DeFreeze (or "Cinque") and by implication the Symbionese Liberation Army (the captors of Patricia Hearst and supposed killers of Oakland School Superintendent Marcus Foster); George Jackson and by implication the San Quentin Six and the Marin County Courthouse Shootout; the Zebra Killers of San Francisco (the authors of a number of random street murders in that city); the Black Muslim Religious Sect; and the Black Panther Party. If this evidence was admissible at all, it was admissible solely against co-defendant Browning.[6] No connection between petitioner and any

[6] Petitioner also argued below that the trial court erroneously denied his numerous requests for a separate trial.

of these persons, organizations, or events was ever shown by the prosecution, and none exists. Nevertheless, the spectre of racial and terrorist violence, prison gang executions, and several of the most notorious persons and events to have entered to public consciousness in the last decade hovered over the trial, undoubtedly contributing to the guilty verdict returned against petitioner.

Petitioner argued extensively below that the prosecutor's purposeful exclusion of black people from his petit jury violated both his state and federal constitutional rights, but the Court of Appeal refused to address his properly raised federal claims.[7] In its opinion filed June 6, 1979, the court merely inquired whether petitioner was entitled to state constitutional relief under *People* v. *Wheeler*, 22 Cal. 3d 258 (1978), and, concluding that *Wheeler* was not to be retroactively applied to petitioner, denied all relief respecting petitioner's peremptory challenge arguments (*see* Appendix A). The California Supreme Court denied discretionary review on August 1, 1979, thereby rendering the decision of the Court of Appeal final (*see* Appendix B).

This petition follows.

[7] In his petition for rehearing in the Court of Appeal and his petition for hearing before the California Supreme Court, petitioner also argued that the court's failure to address his properly-raised federal claims denied him his state and federal due process rights to meaningful appellate review. Both petitions were denied.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Prosecutor's Purposeful and Systematic Exclusion of Sixteen Black People from Petitioner's Petit Jury by the Exercise of Peremptory Challenges Denied Petitioner's Sixth Amendment Right to a Jury Comprising a Fair Cross-Section of the Community. No Court, Including This One, Has Yet Measured the Justification for the Unfettered Exercise of Prosecution Peremptory Challenges Against a Defendant's Sixth Amendment Rights. The Time Is Ripe for this Court to Do So.

As *Taylor* v. *Louisiana,* 419 U.S. 522 (1974), made plain, the requirement that a jury be chosen from a fair cross-section of the community is a fundamental component of a criminal defendant's Sixth Amendment right to jury trial, made binding on the States by the Fourteenth Amendment (*Duncan* v. *Lousiana,* 391 U.S. 145 (1968)).

In *Taylor,* the Court held the Sixth and Fourteenth Amendments were violated by the operation of Louisiana constitutional and statutory provisions exempting women from jury service unless they volunteered. Mr. Justice White, speaking for the seven-member majority, carefully reviewed the Court's prior decisions and concluded, 419 U.S. at 528:

> "The unmistakable import of this Court's opinions, at least since 1940, *Smith* v. *Texas, supra* [311 U.S. 128 (1940)], and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."

While a defendant is not entitled to a jury precisely mirroring the community, *id.* at 538, the concept of "a diffused impartiality," *id.* at 530–531, is essential to the

Sixth Amendment's guarantee. A homogeneous jury not reasonably representative of the community from which it is selected is a jury potentially susceptible to subtle appeals to race or other prejudice—one form of prosecutorial abuse the institution of the jury exists to guard against. *Duncan* v. *Louisiana, supra,* 391 U.S. at 155–156. Moreover, its lack of access to the experience and values of the excluded class, a human perspective which may be crucial to a just result in a given case, leaves it subject to unwitting errors. *Peters* v. *Kiff,* 407 U.S. 493, 503–504 (1972). Beyond these considerations, the jury is the most democratic of our institutions. Its power and legitimacy are derived from the commonly-held notion that its verdict is the verdict of the community. *See generally Taylor, supra,* 419 U.S. at 530; Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels (1977).

It follows that the constitutional guarantee of trial by an impartial jury contemplates trial by a jury comprised of individuals who are both (1) unbiased and (2) sufficiently varied to assure fair representation of the community. The first element, lack of bias, does not mean bland indifference, for jurors are human beings. What it must mean is a willingness or capacity to be persuaded and influenced by the life experiences of others. *See Murphy* v. *Florida,* 421 U.S. 794, 800 (1974) (opinion of Marshall, J.); *Irvin* v. *Dowd,* 366 U.S. 717, 723 (1961); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L.Rev. 545, 551–52 (1975). And the second element, representativeness, is that which assures a broad

diffusion of viewpoints and hence a verdict reflecting the experience and values of the community. Without both components, a jury cannot be deemed "impartial" in the constitutional sense.

Professor Hans Zeisel of the University of Chicago Law School, co-author of Kalven and Zeisel, The American Jury (1966), summed it up as follows:

> "The Court in *Williams* [v. *Florida,* 399 U.S. 78 (1970)] quite correctly emphasized community representation as an essential ingredient of our juries. By now we know that in the crucial twenty percent of all jury trials in which the jury's verdict differs from what the presiding judge would have done, it is precisely the injection of the community's sense of justice which makes the jury verdict what it is." Zeisel, *Six Man Juries, Majority Verdicts—What Difference Do They Make?* 5 Occasional Papers from the University of Chicago Law School (1973), at 3.

True, the facial language of *Taylor* leaves open the question whether the petit jury itself, and not merely the panel from which it is selected, must fairly represent the community. However, the reasoning of *Taylor* and the cases preceding it leaves little doubt that the requirement must apply to the deliberative body, not just the sub-population from which it is selected. The fair cross-section requirement is designed to preserve the impartiality and hence the validity of the jury's verdict. Where, as here, the representative nature of the panel is undermined in the final stage of the selection process (*i.e.,* the challenge stage), adherence to the requirement in earlier stages is an empty gesture. All the evils

the requirement is intended to dispel are reasserted in the final stage. Notably, this Court's recent decision in *Ballew* v. *Georgia,* 435 U.S. 223 (1978), in which the Court held the use of five-person juries in criminal cases violates the fair cross-section requirement, suggests that the requirement applies to the petit jury itself, not merely the panel from which it is selected. Language to the contrary in *Duren* v. *Missouri,* ___ U.S. ___[58 L.Ed.2d 579] (1979), cannot be deemed controlling because *Duren* merely involved a challenge to the composition of Missouri jury venires.[8]

As noted by the California Supreme Court in its landmark decision in *People* v. *Wheeler,* 22 Cal.3d 258, 277–278 (1978):

> "[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. Obviously he cannot avoid the effect of that process: the master list must be reduced to a manageable venire, and that venire must in turn be reduced to a 12-person jury. The best the law can do to accomplish those steps with the least risk to the representative nature of the jury pool is to take them by random means, i.e., by drawing lots. We recognize that in a predictable percentage of cases the result will be a wholly unbalanced jury, usually composed exclusively of members of the majority group. This is inevitable, the price we must pay for juries of a workable size. It is no less inevitable, however, that in all other instances—as in the case at bar—the represent-

[8] The Sixth Amendment guarantees an impartial jury, not merely an impartial panel or venire.

ative nature of the pool or venire will be reflected at least in some degree in the 12 persons called at random to the jury box. It is that degree of representativeness—whatever it may prove to be—that we can and must preserve as essential to trial by an impartial jury. Certainly the prospective jurors are then subject to challenges for cause and peremptory challenges on grounds of specific bias; but for the reasons stated above we cannot countenance the decimation of the surviving jurors by peremptory challenges on the ground of group bias alone."

The Sixth Amendment's impartial jury guarantee is violated whenever jurors are systematically excluded solely on the basis of their group associations rather than their situation-specific biases. *See, e.g.,* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 Yale L.J. 1715 (1977). A contrary rule leaves a fundamental component of the Sixth Amendment's guarantee subject to prosecutorial whim and ensures an impartial jury only when the prosecutor permits it. Beyond that, a contrary rule undercuts the very purpose of the jury:

> "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or overconditioned or biased response of a judge." *Taylor, supra,* 419 U.S. at 530.

In *Wheeler, supra,* the California Supreme Court held that the exclusion of blacks from jury service by peremptory challenge based on group bias is a violation of the impartial jury requirement of article I, section 16 of the California Constitution. *Id.,* at 276–277. The court then fashioned a relatively non-intrusive prophylactic remedy designed to ensure, on a case-by-case basis, that such

violations not take place. *Id.,* at 278–282.[9] In reaching its conclusion, the court relied very heavily on this Court's Sixth Amendment "fair cross-section" cases. *Id.,* at 266–270. The factual circumstances in this case make out a far more egregious instance of improper exclusion than in *Wheeler* or any of the cases reversed under its aegis,[10] but petitioner was denied *Wheeler* relief because *Wheeler* was not made retroactive. 22 Cal.3d at 283 n. 31.[11]

Since this Court's decision in *Swain* v. *Alabama,* 380 U.S. 202 (1965), a criminal prosecutor's exercise of peremptory challenges has uniformly been held immune from federal constitutional attack in the absence of proof of systematic class exclusion by peremptory challenge over a period of time. *Id.,* at 222–228. In *Swain,* however, the claim was one of invidious racial discrimination under the Fourteenth Amendment, not the denial of a defendant's Sixth Amendment right to an impartial jury drawn from and comprising a fair cross-section of the community. *Id.,* at 203–205.[12] Accordingly,

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[9] *Wheeler* procedures were followed in *Commonwealth* v. *Soares,* ___ Mass. ___, 387 N.E.2d 499 (Mar. 8, 1979). *See also State* v. *Brown,* ___ La. ___, 371 So. 2d 751 (May 21, 1979).

[10] *See also People* v. *Johnson,* 22 Cal. 3d 296 (1978); *People* v. *Allen,* 23 Cal.3d 286 (1979).

[11] The state supreme court nevertheless held that *Wheeler* error is "prejudicial per se" because it goes to the very integrity of the fact-finding process. 22 Cal.3d at 283.

[12] Not only did the Court characterize Swain's claim as resting on the constitutional principle enunciated in *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), *see* 380 U.S. at 202, but *Swain* is notably absent from the exhaustive review of the "fair cross-section" cases contained in the majority opinion in *Taylor, supra,* 419 U.S. at 526–531. *See also* Note, *Use of Peremptory Challenges to Exclude Negroes from Trial Jury,* 79 Harv. L.Rev. 135, 136 n. 6 (1965).

It is also clear that no Sixth Amendment claim was addressed in *Swain* because the Sixth Amendment right to jury trial was not held binding in the States until *Duncan* v. *Louisiana, supra,* 391 U.S. at 149, a case decided three years after *Swain.*

no court, including this one, has yet measured the justification for the unfettered exercise of prosecution peremptory challenges against a defendant's Sixth Amendment rights. *Cf. Wheeler, supra,* 22 Cal. 3d at 284.

Indeed, the rule established by *Swain* is only comprehended with that distinction in mind, for *Swain* is predicated on the view that invidious race discrimination is a basis for exercising peremptory challenges unrelated to the outcome of the case. The *Swain* majority relied on the presumption that, in a particular case, the state is exercising its peremptories based on the "real or imagined partiality" of the challenged jurors, *id.* at 220, and not an invidious racial animus. It held that the prosecutor's exclusion of all blacks in a given case is not sufficiently probative of purposeful discrimination to overcome the presumption and thus the prosecutor's reasons for so exercising his challenges—presumptively outcome-related—are insulated from Fourteenth Amendment inquiry. *Id.,* at 222.[13] And having thus disposed of the discrimination claim based on the absence of evidence of systematic exclusion of blacks over a period of time, this Court never considered whether the defendant's Sixth Amendment rights may have been violated.

[13] The *Swain* burden of proof, inapplicable to a Sixth Amendment claim, has been the subject of considerable criticism, much of it based on the near impossibility of a defendant's sustaining that burden. *See, e.g.,* Kuhn, *Jury Discrimination: The Next Phase,* 41 So.Cal. L.Rev. 235, 253, 266 n. 132, 287 (1968); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process,* 18 St. Louis U.L.J. 662, 669–73 (1974).

The *Swain* burden of proof has little applicability to proof of a Sixth Amendment claim. While evidence of the exclusion of black persons from juries over a period of time may bolster a claim of purposeful discrimination because it tends to show the prosecutor's long-standing antagonism toward the excluded class, the absence of such evidence has little probative value in establishing whether a given defendant has been denied an impartial and representative jury.[14] The appropriate inquiry here is not whether the prosecutor has evinced discriminatory intent over a period of time but whether the practice in this case deprived petitioner of a trial by an impartial jury comprising a fair cross-section of the community. To conclude otherwise would endorse the denial of a defendant's Sixth Amendment rights so long as a similar denial is not accomplished in every case. It would also grant the prosecutor a license for abuse limited only by the requirement that he circumspectly choose the cases in which he exercises it.

A prosecutor's exclusion of all black persons from a petit jury solely because they are members of an identifiable racial group frustrates the primary purpose which the fair cross-section rule is designed to facilitate. Such a practice seeks to deny the jury a unique perspective,

[14] Language to the contrary in *Duren* v. *Missouri, supra,* may be distinguished on the basis that *Duren* involved a challenge to the Missouri method of establishing venires. While a state's method of establishing venires is by definition systematic (*i.e.,* it involves more than one case), a given prosecutor's pattern of exercising challenges and whether that pattern contravenes the defendant's Sixth Amendment rights can only realistically be judged on a case-by-case basis.

the inclusion of which may be crucial to ensure both that the jury is impartial and that its verdict approximates that of the community.

As the California Supreme Court observed in *Wheeler:*

> "[W]hen a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—we may call this 'group bias'—and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen, is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority. Seen in this light, the presumed group bias that triggered the peremptory challenges against its members is indistinguishable from the group perspective we seek to encourage by the cross-section rule." *Id.,* at 176 (footnote omitted).

In sum, petitioner's right to a trial by an impartial jury comprising a fair cross-section of the community is well established under the Sixth Amendment. The representativeness requirement applies to the jury itself, not just the panel from which it is selected, and hence that requirement was violated in this case by the prosecutor's unexplained use of his peremptory challenges to exclude all sixteen black persons not excused for cause

from petitioner's jury. Finally, the decision in *Swain* v. *Alabama,* which did not address this claim, cannot be deemed controlling.

This question is one of great importance. Whether a prosecutor's purposeful exclusion of a cognizable class of persons from jury service based on group bias is a common or relatively rare practice, a remedy should exist to protect every defendant's Sixth Amendment rights. Such a remedy may be fashioned without doing substantial violence to existing jury selection systems. *See Wheeler, supra,* 22 Cal.3d at 278–282. The practice of purposeful class exclusion by peremptory challenge strikes at the very integrity of the jury's verdict and should be disapproved by this Court at the earliest possible time.

II. The Prosecutor's Purposeful and Systematic Exclusion of Sixteen Black People from Petitioner's Petit Jury by the Exercise of Peremptory Challenges Denied Petitioner the Equal Protection of the Laws. The Time Is Ripe for Consideration of Whether *Swain* v. *Alabama* Should Be Overruled.

Turning to petitioner's equal protection claim, petitioner maintains that the *Swain* burden-of-proof has been significantly eroded by subsequent decisions of this Court. Two such cases, *Whitus* v. *Georgia,* 385 U.S. 545 (1967), and *Alexander* v. *Louisiana,* 405 U.S. 625 (1972), vividly indicate this erosion. Petitioner also maintains that this Court has increasingly countenanced the use of statistics in a single case to demonstrate a low probability that mere chance alone—rather than unconstitutionally discriminatory bias—was responsible for the exclusion of black persons from jury service or employment opportunities.

In *Whitus*, for example, this Court reaffirmed the constitutional principle that "[f]or over fourscore years it has been . . . the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury *or the verdict of a petit jury from which Negroes were excluded by reason of their race.*" *Whitus, supra,* 385 U.S. at 549–550 (emphasis supplied). Significantly, in reaffirming this principle *Whitus* did not explicitly carve out an exception for those instances where such exclusion results from the use of peremptory challenges. In fact, the Court held that petitioner had made a *prima facie* showing of racial discrimination based in part on data that, from a venire of 90 persons of which at least seven were black, "no Negro was accepted on the petit jury." *Id.* at 550. Thus, the Court in *Whitus* specifically held that the actual petit jury which tries a criminal defendant must be chosen in a manner which does not exclude blacks because of their race. To the extent that *Swain* condoned any racially discriminatory use of peremptory challenges to choose a petit jury, it must be considered to have been overruled at least implicitly by the subsequent decision in *Whitus.*

In *Alexander* v. *Louisiana, supra,* this Court held that petitioner had proved that the makeup of the grand jury which had indicted him had violated the Equal Protection Clause. The proof for this claim was statistical data. Petitioner had argued that there had been "a consistent

process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury *at each stage* of the selection process until ultimately an all-white jury was selected to indict." *Alexander* v. *Louisiana, supra,* 405 U.S. at 629 (emphasis added). The Court in *Alexander* agreed that the facts presented constituted a *prima facie* case of discrimination. The burden of demonstrating a lack of racial bias in the process of selecting the grand jury then shifted to the state, which failed to carry that burden. *Id.* at 632.

Since the use of peremptory challenges is the final stage of selecting a jury as well as that stage most readily subject to discriminatory abuse, *Alexander*—like *Whitus*—must be read as having qualified *Swain.* It should be viewed as having disapproved *sub silentio* any indication in *Swain* that the racially discriminatory use of peremptory challenges in a specific case cannot be proved in any way other than by showing the systematic exclusion of blacks over a period of time.

The erosion of *Swain's* holding that the discriminatory use of peremptory challenges cannot be proved from statistical data in an individual case is further demonstrated by the Court's increasing recognition of the probative force of statistical evidence in establishing a *prima facie* case of racial discrimination. This is demonstrated by many decisions subsequent to *Swain* in the fields of jury selection (*see, e.g., Rose* v. *Mitchell,* ____ U.S. ____ [47 U.S.L.W. 4948] (July 2, 1979); *Castaneda* v. *Partida,* 430 U.S. 482, 487–90 (1977); *Turner* v. *Fouche,* 396 U.S. 346, 349–52 (1970); *Carter* v. *Jury Comm'n of*

Greene County, 396 U.S. 320, 327–28 (1970); *Simms* v. *Georgia*, 389 U.S. 404, 407 (1967); *Jones* v. *Georgia*, 389 U.S. 23, 25 (1967)) and employment discrimination (*see, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336–339 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1973); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973)). These cases indicate that statistical analysis of the probability of racial discrimination in a *single case* is now well accepted by the Court as a factor in proving such discrimination. Hence, the requirement of *Swain* that a criminal defendant must show the systematic, historically discriminatory use of peremptory challenges by a prosecutor before he can obtain a new trial free from such error appears outdated and should be overruled.

In this case, the probability that all sixteen black persons peremptorily challenged by the prosecution were excluded on the basis of mere chance is very low indeed. Conversely, the probability that the exclusion of all blacks was caused by an invidiously discriminatory animus is very high. If such racial animus infected the prosecutor's use of his peremptory challenges, the selection of petitioner's jury was unconstitutionally tainted and his judgment of conviction must be reversed.[15] At

[15] Because the prosecutor attempted to justify the exclusion of all blacks on a generalized and racially stereotypic basis (*see* Jury Selection Transcript 898), this case bears a marked similarity to *People* v. *Johnson*, 22 Cal.3d 296 (1978). Petitioner submits that such a prosecutorial admission obviates the necessity of a defendant's coming forth with any proof at all of an improper racial motive for the exclusion.

the minimum, these facts make out a *prima facie* case of purposeful discrimination, shifting the burden of proof to the prosecution.

The practice of the invidiously discriminatory exclusion of black people from jury service by the exercise of peremptory challenges is an affront to cherished constitutional principles articulated by this Court a century ago in *Strauder* v. *West Virginia*, *supra*, 100 U.S. 303 (1880). But for its decision in *Swain* v. *Alabama*, the Court has vigilantly protected those principles from *Strauder* to the present day, *see, e.g., Rose* v. *Mitchell*, *supra*, ___ U.S ___ [47 U.S.L.W. 4948] (July 2, 1979). The time is ripe for consideration of whether *Swain* v. *Alabama* should be explicitly overruled.

CONCLUSION

For the foregoing reasons, the writ should issue.

DATED: September 27, 1979

Respectfully submitted,

QUIN DENVIR, *California State Public Defender*

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Deputy State Public Defender

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APPENDIX A

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* vs. EDDIE LEE WEATHERSBY *Defendant and Appellant.*	1 Crim. 16999 (Sup. Ct. No. 62020)
PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* vs. ALLEN RAY TUCKER, *Defendant and Appellant.*	1 Crim. 17113 (Sup. Ct. No. 62020)
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK L. EATON, in his official capacity as a magistrate, *Defendant,* EDDIE LEE WEATHERSBY and ALLEN RAY TUCKER, *Real Parties in Interest and Appellants.*	1 Civil 42353 (Sup. Ct. No. 480245-7)

Eddie Lee Weathersby and Allen Ray Tucker appeal from judgments following a jury verdict finding them guilty of first degree murder (Pen. Code, § 187), and also appeal as real parties in interest from a judgment granting the People a peremptory writ of prohibition restraining a judge of the municipal court from taking any action in the case.

I

Lester Nelson was stabbed and bludgeoned to death by a group of inmates at the Alameda County jail at Santa Rita upon his return to the facilities after a court appearance. The evidence showed that the motive for the killing was revenge for Nelson's murder of Nira Bostic, who had once lived with inmate Gerald Terry.

On May 10, 1976, the district attorney filed a complaint in municipal court charging appellants, as well as Ricky Wyatt and Stephen Browning, with the murder of Lester Nelson. Two days later, the Grand Jury of Alameda County indicted these four individuals for the same murder.

After securing the indictment, the district attorney moved to dismiss the earlier complaint, but the magistrate denied the motion on the ground that defendants would thereby be deprived of a preliminary hearing.

The prosecutor then petitioned the superior court for a writ of prohibition seeking to restrain the municipal court judge from taking any further action on the complaint. That court issued the peremptory writ.

The case proceeded to trial against Browning, Wyatt,

Weathersby and Tucker, Tucker's motion for severance having been denied. After the first 12 jurors were selected, the defendants moved to dismiss the jury and for an order declaring a mistrial based upon the district attorney's systematic exclusion of blacks from the jury panel through the use of peremptory challenges. The motions were denied. On several occasions during the course of trial, appellants' respective counsel moved for severance and for mistrial, based upon allegedly prejudicial evidence regarding Browning's prior activities, especially in connection with the Black Guerilla [sic] Family.

The jury found appellants guilty of first degree murder. Later in the same day, the court gave the *"Allen"* instruction. Soon thereafter, the jury returned with a verdict of acquittal as to defendant Wyatt and second degree murder as to defendant Browning.

On April 3, 1978, this court granted defendant Browning's "Motion for Summary Reversal" based upon the giving of the *Allen* instruction. (*People* v. *Browning* (1978) 79 Cal.App.3d 320.) We are now confronted with the direct appeals of appellants Weathersby and Tucker emanating from the same action.

II

A. Is Reversal Required Because Of The Failure Of The Trial Court To Grant Appellants A Preliminary Hearing?

Both appellants argue that the superior court's peremptory writ of mandate, which allowed them to be prosecuted under an indictment without a preliminary examination, deprived them of their constitutional

rights under the Sixth and Fourteenth Amendments.

The California Supreme Court has recently decided the issue in *Hawkins* v. *Superior Court* (1978) 22 Cal.3d 584. It held that the denial of such fundamental rights as counsel, confrontation and a hearing before an impartial magistrate to defendants prosecuted solely under an indictment violated the equal protection clause of the California Constitution. The opinion stated: "Because of previous reliance by the bench and bar on the validity of current postindictment procedures, the rule announced herein shall apply only to the present case and to those indicted defendants who have not entered a plea at the time this opinion becomes final. [Citation.]" (*Id.*, at p. 594.)

Because appellants' pleas were entered long before the issuance of the *Hawkins* decision their contention must be governed by prior law on the subject, which consistently rejected constitutional attacks on the state's indictment procedure. (See *People* v. *Sirhan* (1972) 7 Cal.3d 710, 746–747 and cases cited therein; *People* v. *McGrath* (1976) 62 Cal.App.3d 82, 85.) Consequently, there was no error in failing to accord appellants a postindictment preliminary examination.

We do note that the magistrate below refused to dismiss the complaint against the defendants and was restrained from taking any further action thereon under a writ of prohibition issued by the superior court. It is also true that in *People* v. *Levins* (1978) 22 Cal.3d 620, the Supreme Court held that the superior court had no jurisdiction to compel a magistrate to dismiss a criminal

complaint under Penal Code section 1385, because that section authorizes dismissal only by trial courts and not by magistrates. (*Id.*, at p. 624; see *People* v. *Peters* (1978) 21 Cal.3d 749.) However, that holding does not affect the result herein: the writ issued by the superior court commands the magistrate "to permanently desist and refrain from taking any further action in [the case at bar]*except* to recalendar and dismiss the complaint. . . ." (Emphasis added.) Although, under *Levins*, the superior court was without jurisdiction to order the magistrate to dismiss the complaint, it did have the authority to restrain the magistrate from proceeding any further, thereby allowing the prosecution to proceed by indictment. (See *People* v. *Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 193–194.) Inasmuch as appellants were tried and convicted under a valid accusatory pleading, the judgment may not be disturbed for failure to accord them a preliminary examination. (Cf. *People* v. *Combes* (1961) 56 Cal.2d 135, 145.)

B. Did The Prosecutor Improperly Use Peremptory Challenges To Systematically Exclude Blacks From The Jury?

Appellants also contend that the prosecutor used his peremptory challenges to exclude black persons from the jury, thereby denying appellants their rights to a jury trial and violating the due process and equal protection clauses.

Again, the California Supreme Court has recently issued a decision on the subject. In *People* v. *Wheeler* (1978) 22 Cal.3d 258, the court ruled that the use of

peremptory challenges to exclude jurors solely on the basis of group bias violated a defendant's right to trial by jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. (*Id.*, at pp. 276–277.) Once again, however, the court recognized the practical problems of applying such a rule to pending cases and limited the retroactivity of its holding. The court said: "The rule we adopt herein applies to the defendants in the case at bar and . . . to any defendant now or hereafter under sentence of death. [Citation.] In all other cases the rule will be limited to *voir dire proceedings conducted after the present decision becomes final.*" (22 Cal.3d at p. 283, fn. 31, emphasis added.)

In his reply brief, counsel for appellant Weathersby argues that we should not follow this language, because it is inconsistent with the principles regarding retroactivity as stated in other Supreme Court cases. This argument must necessarily fail. As an intermediate appellate court, we are bound to follow the law as declared by the Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Did The Trial Court Improperly Deny Appellants' Motions For Severance and Mistrial?

Both appellants also contend that the trial court should have granted their numerous requests to sever their trials from that of the other defendants. Their argument is premised primarily on the fact that assertedly prejudicial evidence was introduced regarding defendant Browning and especially his leadership role in the

Black Guerilla [sic] Family, which "probably" influenced the jury's verdict against them. As corollary contentions, Weathersby assigns reversible error to the admission of evidence relating Browning to the Black Guerilla [sic] Family and to the 1974 killing of one William Cross at San Quentin, while Tucker argues that such evidence, along with references to the Muslim religion and to Zebra killers, was irreparably prejudicial and should have resulted in the granting of defense motions for mistrial.

Under Penal Code section 1098, where two or more defendants are charged with the same offense, "they *must* be tried jointly" unless the court in its discretion orders a separate trial. (Emphasis added.) A joint trial is thus the rule and a separate trial the rare exception. (Witkin, Cal. Criminal Procedure (1963) Trial, § 291, p. 285.) A trial court has full discretion in determining a motion for severance: that discretion will not be disturbed by the reviewing court absent a clear showing of abuse. (*People* v. *Floyd* (1970) 1 Cal.3d 694, 720; *People* v. *Simms* (1970) 10 Cal.App.3d 299, 307.)

Similarly, a motion for mistrial is addressed to the discretion of the trial court and may properly be refused where the court is satisfied that no injustice has resulted or will result from the events of which the complaint ensues. (*People* v. *Slocum* (1975) 52 Cal.App.3d 867, 884; *People* v. *Ray* (1967) 252 Cal.App.2d 932, 962.)

There was no abuse of discretion in denying appellants' motions for severance and mistrial based upon testimony linking defendant Browning to prison gangs

or black terrorist groups. The victim in this case, Lester Nelson, was also black. It is not an abuse of discretion to refuse to grant a severance because damaging testimony against a codefendant would not be admissible against the moving defendant. (*People* v. *King* (1938) 30 Cal.App.2d 185, 206; *People* v. *Lamb* (1962) 204 Cal.App.2d 255, 264.) Furthermore, appellants do not dispute the fact that each time such references were made, the trial judge either ordered them stricken or carefully admonished the jury that such evidence was limited to Browning and was not to be considered as to the other defendants. Their argument that the admonishments were not enough is based on a view that the jurors could not possibly have obeyed the court's instructions. The law, however, is precisely to the contrary: in the absence of other evidence, it must be presumed that the jury followed the court's instructions. (*People* v. *Rosoto* (1962) 58 Cal.2d 304, 326.)

That the jury listened to and did follow the court's admonitions is also demonstrable from the record. The minutes of court proceedings show that the jury had no difficulty in rendering a unanimous guilty verdict against both appellants, but remained deadlocked on the issue of Browning's guilt. This refutes appellants' contention that they were convicted of "guilt by association" with Browning. Moreover, after being given the tainted *Allen* instruction, the jury arrived at a second degree murder verdict against Browning but *acquitted* defendant Wyatt. Again, this demonstrates that this jury had the ability and did consider the evidence against each defendant separately.

Finally, any error in denying appellants' motions or evidence connecting Browning with the Black Guerilla [sic] Family or other crimes was decidedly harmless. Appellants' participation in the Nelson murder was corroborated by the eyewitness accounts of no less than four witnesses. Given the overwhelming evidence of guilt, it cannot be said a more favorable verdict would have been reasonably probable in the absence of the alleged errors. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

D. Did The Trial Court Err In Admitting Into Evidence Nelson's Autopsy Photographs?

Appellant Tucker contends that the trial court's ruling which allowed into evidence five colored autopsy slides and photographs of Nelson's body, constituted an abuse of discretion under Evidence Code section 352.* The exhibits reveal numerous and gruesome injuries inflicted upon the corpse, including stab wounds, deep lacerations, disfigurements and fractures.

"When allegedly gruesome photographs are presented, the trial court in the exercise of its discretion must decide whether their probative value outweighs their possible prejudicial effect." (*People* v. *Arguello* (1967) 65 Cal.2d 768, 775.) Tucker claims that the photographs had no effect other than to inflame the passions of the

* This section provides, in relevant part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

jury against the defendants. This is not true. The photographs were relevant to clarify the testimony of the autopsy surgeon and as circumstantial evidence of malice. (*People* v. *Arguello, supra,* 65 Cal.2d at p. 775; *People* v. *Brawley* (1969) 1 Cal.3d 277, 295.) Although the photographs may have been unpleasant to view, it cannot be said the court abused its discretion in admitting them. (*Id.*) In light of the eyewitness testimony of the murder of Nelson, the photographs of his body provided nothing more shocking to the jurors than what they had already been told.

Furthermore, as noted above, the evidence of appellants' guilt was so overwhelming that any error in admitting the photographs presents no cause for reversal. (See part C, *supra.*)

E. Was The Prosecutor Guilty Of Prejudicial Misconduct?

Appellant Weathersby contends that the judgment against him should be reversed because of misconduct by the prosecutor. At no time during any of the instances of asserted misconduct, did defense counsel make a proper objection or request the trial judge to admonish the jury to disregard the remarks. In the absence of such an assignment of error *and* a request for an admonition or curative instruction, prosecutorial misconduct may not be assigned as error on appeal, unless (a) the case is closely balanced, presenting grave doubt concerning defendant's guilt and the misconduct materially contributed to the verdict, or (b) the misconduct was so reprehensible that no admonition could have cured it.

(*People* v. *Lyons* (1958) 50 Cal.2d 245, 262; *People* v. *Meneley* (1972) 29 Cal.App.3d 41, 58–59; *People* v. *Heideman* (1976) 58 Cal.App.3d 321, 327.)

The first of these exceptions is inapplicable here. Weathersby's participation as one of the principal assailants was established without question by four eyewitnesses. Counsel's assertions that "this was a very close case" and that the evidence was "weak and suspect" are truly remarkable.

We also reject the proposition that any misconduct was reprehensible beyond redemption. Prosecutorial misconduct "implies a dishonest act or an attempt by an attorney to persuade the jury by the use of deceptive or reprehensible methods." (*People* v. *Beivelman* (1968) 70 Cal.2d 60, 75.)

Weathersby's citations of alleged misconduct are of a trivial or insignificant nature. He first claims that misconduct was demonstrated by the exclusion of black members from the jury by use of peremptory challenges. But in view of the fact that this practice was permissible under governing authority at the time, this can hardly form the basis for an assignment of misconduct. Weathersby complains that the prosecutor "needled" the defendants by "winking at them." The record shows that in the one instance the prosecutor did engage in this behavior, but only in response to defendant Browning's calling him a derogatory name. He was promptly instructed by the trial court to desist. Weathersby further complains about the prosecutor's referring to him by his nickname "Buzz." Yet the record is clear

that this was the name by which his fellow inmates knew him. He cites as misconduct the prosecutor's attempt to raise the spectre of prison gangs and terrorist groups in the jury's mind; however the record shows that most of this "inflammatory" material was first introduced by counsel for the defense. On one occasion, the prosecutor did make an improper reference to the Black Muslims as belonging to the same group as the "Zebra killers" in San Francisco. In the absence of a request for admonition, however, the trial judge's order striking the reference was sufficient to cure any prejudice. (Cf. *People* v. *Ney* (1965) 238 Cal.App.2d 785, 798.)

The other citations of misconduct contained in Weathersby's attack are not worthy of specific reply, since they either involve conduct which took place out of the presence of the jury, or pertain to instances of personal animosity between the prosecutor and Browning. Any resulting prejudice to Weathersby was therefore either negligible or nonexistent.

We conclude that the prosecutor did not commit prejudicial misconduct.

The judgments in *People* v. *Weathersby* and *People* v. *Tucker* are affirmed. The appeal from the judgment in *People* v. *Eaton* is dismissed as moot.

_____

Poche, J.

We Concur:

_____ _____

Caldecott, P.J. Christian, J.

Appendix B

Order Due
August 3, 1979

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4, CR. No. 16999, 17113, 42353

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent
v.
EDDIE LEE WEATHERSBY,
Defendant and Appellant
(and related matters)

Petitions for hearing DENIED.

/S/ BIRD
Chief Justice

Supreme Court, U. S.
FILED
DEC 20 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-569

EDDIE LEE WEATHERSBY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Response in Opposition to Petition for Writ of Certiorari

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of the case	2
1. The crime	2
2. Proceedings on selection of a jury	4
Reason for denying the writ	7
The prosecutor did not use peremptory challenges to exclude black persons from the Petit jury solely on the basis of race, without regard to legitimate trial-related objectives	7
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

People v. Wheeler 22 Cal.3d 258 (1978)	8, 9
Swain v. Alabama 380 U.S. 202 (1964)	8, 9
Taylor v. Louisiana 419 U.S. 522 (1975)	8, 9

Constitutions

United States Constitution:	
Sixth Amendment	7, 8
Fourteenth Amendment	8

Statute

Title 28, United States Code, section 1257(3)	1

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-569

EDDIE LEE WEATHERSBY,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Response in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

Petitioner seeks review of a judgment affirming his conviction for first-degree murder entered by the California Court of Appeal, First Appellate District, Division Four on June 6, 1979. Pursuant to California Rules of Court, Rule 976, the opinion was neither officially reported nor published, but is set forth in full as Appendix A to the petition. On August 3, 1979, the California Supreme Court denied the petition for hearing.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Whether the prosecutor used peremptory challenges to exclude black persons from the petit jury solely on the basis of race, without regard to legitimate trial-related objectives.

STATEMENT OF THE CASE

By indictment filed May 12, 1976, the Alameda County Grand Jury accused petitioner and codefendants Allen Ray Tucker, Stephen Douglas Browning and Enrique Eugene Wyatt of the murder of Lester Nelson (CT 1-5). Petitioner pleaded not guilty (CT 43-46). On March 24, 1977, after a two-month trial by jury, petitioner was found guilty of first-degree murder (CT 178, 182-184).

1. The Crime.

On the afternoon of April 26, 1976, Lester Nelson was returned to the Alameda County Jail at Santa Rita, California following a court appearance. Shortly after he entered one of the barracks, he was stabbed and bludgeoned to death by a group of inmates including petitioner Weathersby and his codefendants Tucker and Browning. The prosecution demonstrated that the motive for Nelson's killing was revenge for a murder Nelson himself had supposedly committed (RT[1] 454, 512-514).

As Nelson walked into the barracks he was confronted by petitioner near the shower. Suddenly codefendant Tucker pushed against Nelson from the opposite side, trapping Nelson as he attempted to flee. Codefendant Browning blocked the escape while petitioner and Tucker

[1]"RT" refers to the reporter's transcript of the trial. "JRT" refers to the reporter's transcript of the proceedings in selecting a jury.

took out a knife and a sharpened wire and stabbed Nelson dozens of times in the head, chest, back and arms (RT 583-584, 650-652, 949-951, 1114-1117, 1377-1379). Browning supervised the assault, ordering the stabbing to continue as long as Nelson kept breathing (RT 1379). Finally, Browning grabbed Nelson by the legs and dragged him into the shower room, where he was beaten savagely about the head with a mop wringer, causing fractures of his facial bones, teeth, hard palate, and skull (RT 582-586, 594-597, 653-656, 862, 951-953, 1119-1120, 1380).

Petitioner's allegations that this was a close case based on weak evidence, and that the jury had difficulty reaching a verdict are not true. As the Court of Appeal noted, "the assertions that 'this was a very close case' and that the evidence was 'weak and suspect' are truly remarkable." (Pet., App. A, p. 11). The evidence of guilt was utterly overwhelming and the "minutes of the court proceedings show that the jury had no difficulty in rendering a unanimous guilty verdict" against petitioner Weathersby (Id. at p. 8).

Similarly, petitioner's innuendo that the prosecutor made inflammatory appeals "to the racial fears and prejudices of the all-white jury" (Pet., p. 5) and attempted to raise "the spectre of racial and terrorist violence, prison gang executions, and several of the most notorious persons and events to have entered public consciousness in the last decade" (Pet., p. 7) is patently false. These allegations of misconduct were expressly rejected by the Court of Appeal (Pet., App. A, p. 12). The record shows that the *defense* introduced the "inflammatory" material in

allusions to the Black Guerrilla Family (e.g., RT 1134, 1531-1550, 1598-1563), Donald ("Cinque") DeFreeze (RT 2639), George Jackson (RT 2375), and the Black Muslim sect (RT 2235). On the single occasion when the prosecutor, cross-examining a defense witness, alluded to the "Zebra" killings, a relevancy objection was sustained and the question ordered stricken (RT 2282, 2314). Petitioner's insinuation that the prosecutor deliberately sought to rely on such extraneous and highly prejudicial material to bolster an otherwise frail case is thus untrue.

2. Proceedings on Selection of a Jury.

Petitioner also distorts the record in his account of the jury voir dire. The first time that the defense alleged that the prosecutor had "systematically excluded" black jurors by use of peremptory challenges, the court responded by reviewing the statistics of the use of challenges. Noting that the prosecutor had used 23 peremptory challenges up to that point and that only half of those had been used to excuse blacks, the court found that "I have no basis upon which to find systematic exclusion of black jurors." (JRT 474).

During the selection of alternate jurors the defense renewed its claim that the prosecutor was using his peremptory challenges to systematically exclude blacks from the jury. According to the defense tally, of the total of 134 potential jurors that had been summoned, 19 were black. Three of these 19 had been excused by the court for cause, and the prosecutor had used 16 of his total of 34 peremptory challenges to excuse the rest (JRT 832-833). As if to confirm the prosecutor's invidious intention in his use of

peremptory challenges, petitioner states that the prosecutor winked at the defendants several times after he had excused black persons. (Pet. pp. 5-6). The full record establishes that what actually took place had nothing to do with the deputy district attorney's use of challenges. When he was asked to reply to the charge of provoking the defendants he said:

> "It is true, Your Honor, [defense counsel] is quite correct, I did wink at Mr. Browning, but only as a response to a statement made by him under his breath. By reading his lips, he looked at me and called me a fucking pig. I want that on the record." (JST 837).

It is thus deceptive to imply that the "winking" episode somehow establishes the prosecutor's racial bias.

It is also misleading to state that in presenting his reasons for exercising peremptory challenges the prosecutor made "a clear admission of systematic exclusion based on group bias." (Pet., p. 6). In response to the final motion for mistrial on the grounds of improper use of challenges, the prosecutor rebutted the accusation by setting forth several of the reasons why he had excuse blacks:

> "MR. ANDERSON [the prosecutor]: Your Honor, I just want to point out this is about the fourth or fifth time that they have made a motion for mistrial on grounds of systematic exclusion of the jury, and they have indicated that some 16 blacks have been excused by the prosecution in this case. I want to point out for the record that one, possibly two of them were represented by [a defense attorney's] law firm, . . . Another black potential juror indicated she knew the defendant Ray Tucker's wife. Other ones I felt gave evasive answers to some pretty basic questions out

there, and whether it can be perceived by others, as His Honor knows, having been a great trial attorney in the past, it takes a gut reaction as to somebody you feel is giving an evasive or untruthful answers to the questions posed.

Due to those circumstances in this case, and the nature of the Black Guerrilla Family, I feel also that *some* black jurors would be subject to some intimidation by the group, which His Honor has indicated by a pre-trial ruling that the prosecution may bring up via opening statement and evidence to be introduced at the trial . . .

Due to all those considerations, the fact that *some* jurors *might* be subject to intimidation by the BGF, and that the BGF has parolees on the streets of Alameda County right now, and the fact that some of them are represented by [a defense attorney's] law firm and some knew defendant Ray Tucker's wife, I fail to see how they can make the allegation that I am systematically excluding blacks from this particular panel." (Emphasis added.) (JRT 897-898).

These remarks establish that there were several obvious affirmative reasons for the prosecutor's use of peremptory challenges, all of them deriving from legitimate trial-related considerations and wholly unrelated to race. The valid apprehension that *some* black juror *might* be subjected to intimidation by the Black Guerrilla Family shows a realistic and solicitous regard for the welfare of potential jurors and a determination to obtain an impartial jury, not generalized racial bias. In short, the impression petitioner seeks to convey of systematic exclusion solely on the basis of race is completely refuted by the record.

Finally, we note that the prosecutor did not exercise one of the peremptory challenges he still had against the seating of a black alternate juror (JRT 884-885). Given the length and difficulty of this trial, there was a clear possibility that alternate jurors would be called upon to serve.

REASON FOR DENYING THE WRIT

The Prosecutor Did Not use Peremptory Challenges to Exclude Black Persons From the Petit Jury Solely on the Basis of Race, Without Regard to Legitimate Trial-Related Objectives.

Petitioner claims a denial of his Sixth Amendment right to an impartial jury of his peers because of the prosecutor's use of peremptory challenges to exclude black jurors from his petit jury. As we have shown above, however, the record in this case discloses that the prosecutor did not challenge potential black jurors because they were black. When his motives had been repeatedly impugned, he gave a clear statement of his reasons for challenging particular black jurors, reasons not based on racial prejudice. The prosecutor noted that two of the black jurors had been represented by counsel for a codefendant, and that another knew a codefendant's wife. He disclosed that an unspecified number gave what he perceived to be evasive or untruthful answers to his questions on voir dire. Finally, he mentioned that given the circumstances of the case and the nature of the Black Guerrilla Family, he feared that an unspecified number of potential black jurors might be vulnerable to intimidation. We submit that petitioner's entire argument falters at the outset. The alleged "purposeful and systematic exclusion" of black jurors solely on the basis of race simply did not happen in this case.

Petitioner invites this Court to adopt the rule announced by the California Supreme Court in *People v. Wheeler* 22 Cal.3d 258 (1978) that peremptory challenges are no longer "peremptory" when an opponent objects that they are being used solely on the grounds of "group bias." Upon such objection, the California Constitution now requires a justification, excuse, or explanation of the "peremptory" challenge. *Id.* at 280. California has thus enacted the "radical change in the nature and operation of the challenge" which this Court has declined to do since *Swain v. Alabama* 380 U.S. 202, 222-223 (1964).

Petitioner cites a group of cases decided by this Court since *Swain* which, he maintains, have "eroded" the *Swain* holding concerning the use of peremptory challenges in a single case. Every one of these cases is inapposite since they all deal with the composition of grand juries or jury venires, not petit juries. Petitioner's entire argument is an effort to eliminate the established distinction between the jury venire and the petit jury. In *Taylor v. Louisiana* 419 U.S. 522 (1975), one of the petitioner's principal cases, this Court held that the presence of a fair cross section of the community on the panels from which petit juries are drawn is essential to the fulfillment of the Sixth and Fourteenth Amendment guarantee of trial by an impartial jury. But *Taylor* also expressly rejected the proposition that the ultimate petit jury be subject to the same cross section requirement.

> "It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, [citations omitted]; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at p. 538.

As Justice Richardson argued in his dissent in *Wheeler*, this is

> "the only feasible rule, given the element of chance which necessarily, and properly, is injected in the process through use of the jury wheel. For although the jury panel sitting in the courtroom may reflect to perfection the economic, social, occupational, sexual, religious and cultural community from which it is drawn, once the jury wheel is turned and the first names are drawn the situation is changed. Fate takes a hand. The first 12 names drawn may be all men, or all women, all black or all white, all from the poor, or from the wealthy class. The exercise of the peremptory challenge by both sides is directed to 12 persons who may not be, at any given time, 'representative' of either the community or the venire. It is not the true function of peremptories to 'restore' any balance, but rather, to the extent humanly possible to attain impartiality. Thus the true rule and goal should be that while the jury venire, or pool, or reservoir must be 'representative' the trial jurors must be 'impartial.' " *Wheeler, supra*, 22 Cal.3d at 291

Petitioner simply fails to address this vital distinction, defined by this Court in *Swain* and not since questioned except in California. For this reason above, quite apart from

his selective and distorted presentation of the record, his claims should be rejected.

CONCLUSION

For the stated reasons, the People of the State of California respectfully urge this Court to deny the petition for a writ of certiorari.

DATED: December 14, 1979

Respectfully submitted,

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DEC 29 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79—569

EDDIE LEE WEATHERSBY,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

PETITIONER'S REPLY BRIEF

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TOPICAL INDEX

	Page
PETITIONER'S REPLY BRIEF	1
I Petitioner's Statement of the Case is Supported by the Record	1
II Intervening Matter Not Available at the Time of Petitioner's Last Filing Underscores the Need for Guidance from this Court	7
CONCLUSION	10

TABLE OF AUTHORITIES CITED

CASES

Page

Commonwealth v. *Soares*, _____ Mass. _____, 1979 Mass.Adv.Sh. 593, 387 N.E.2d 499 (Mar. 8, 1979) 7, 9
Duren v. *Missouri*, _____ U.S. _____ [58 L.Ed.2d 579] (1979) 2
Estelle v. *Williams*, 425 U.S. 501 (1976) 3
Kelly v. *Stone*, 514 F.2d 18 (9th Cir. 1975) 4
McFarlane v. *Smith*, _____F.2d_____[26 Cr.L. 2208] (4th Cir. Oct. 29, 1979) 4
People v. *Bain*, 5 Cal.3d 839 (1971) 4
People v. *Johnson*, 77 Cal.App.3d 866 (1978) 4
People v. *Lucero*, 99 Cal.App.3d_____(2 Crim. No. 34938 Nov. 26, 1979) 6, 7, 8
People v. *Wheeler*, 22 Cal.3d 258 (1978) 2, 7, 8, 9
Strauder v. *West Virginia*, 100 U.S. 303 (1880) 2
Swain v. *Alabama*, 380 U.S. 202 (1965) 8, 9
Taylor v. *Louisiana*, 419 U.S. 522 (1974) 2
United States ex rel. Haynes v. *McKendrick*, 481 F.2d 152 (2d Cir. 1973) 4
United States v. *Danzey*, 476 F.Supp. 1065 (E.D.N.Y. Oct. 3, 1979) 8

CONSTITUTIONAL PROVISIONS

California Constitution:
Article I, section 16 7
United States Constitution:
Sixth Amendment 6, 7, 8, 9, 10
Fourteenth Amendment 6, 7, 8

ARTICLES

Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 Harv. L. Rev. 1770 (1979) 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-569

EDDIE LEE WEATHERSBY,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

PETITIONER'S REPLY BRIEF

Petitioner hereby replies to respondent's brief in opposition and respectfully calls to the Court's attention intervening matter not available at the time of his last filing.

I. Petitioner's Statement of the Case is Supported by the Record.

By insinuating that petitioner has misstated the facts, the brief in opposition attempts to divert the Court's attention from the substantial legal issues raised by this case. The errors assigned by the petition are so fundamental that their existence must be prejudicial *per se,* requiring reversal of a criminal conviction without re-

gard to the quantum of evidence of guilt.[1] Nevertheless, petitioner stands by his characterization of the record.

This *was* a close case. The jury deliberated more than 24 hours over a period of four days before returning petitioner's guilty verdict (RT 3290–3317).[2] On the second day of deliberations, one juror inquired why there was no form for a hung jury (RT 3305), and on the fourth day, just 29 minutes after petitioner's verdict was returned, the trial judge gave the *Allen* instruction for deadlocked juries which formed the basis of the reversal of codefendant Browning's subsequent conviction (RT 3322–3324). And these were the deliberations of an all-white jury from which sixteen black people had been excluded by prosecution peremptory challenges (CT 135; JST 832–833).

The prosecution's case *was* weak and suspect. Virtually all prosecution "eyewitnesses" had received promises of leniency, dismissals of pending charges, or other benefits in exchange for their testimony. (*See* RT 56, 68, 99, 638, 663–664, 667, 872–883 (witness Hackney); RT 93, 1470–1473, 1573–1577 (witness Guidry); RT 489–492 (witness Terry); RT 956–957, 1014–1015, 1091–1092 (witness Bell); RT 1368 (witness Anjell); RT 1954, 1957, 1971 (witness Pugh)). Moreover, the credibility of the testimony of each was undermined by significant inconsis-

[1] *E.g., Duren* v. *Missouri,* ___ U.S. ___, ___ [58 L.Ed.2d 579, 589–590, 589 n.26] (1979); *Taylor* v. *Louisiana,* 419 U.S. 522, 528 (1974); *Strauder* v. *West Virginia,* 100 U.S. 303, 309–312 (1880); *People* v *Wheeler,* 22 Cal.3d 258, 283 (1978).

[2] "RT" refers to Reporter's Transcript on Appeal; "CT" refers to Clerk's Transcript on Appeal; "JST" refers to the Augmented Reporter's Transcript of the Jury Selection Proceedings.

tencies or impeachment.[3] Under the circumstances, petitioner's assertion that the prosecution's case was weak and suspect is unremarkable and supported by the record.

While some of the racially volatile matter before the jury was concededly brought up by counsel for petitioner's codefendants (*e.g.,* references to Donald DeFreeze and the Black Panther Party were injected into the trial by counsel for codefendant Tucker (RT 2639)), Anderson *did* make many references to the Black Guerrilla Family ("BGF");[4] the 1974 uncharged San Quentin

[3] For example, witness Terry seemingly recanted his testimony on the witness stand, *i.e.,* he apologized for testifying on behalf of the prosecution and stated he knew of nothing the defendants had done wrong (RT 495–496); he also indicated he had been threatened with a conspiracy prosecution if he didn't cooperate (RT 489). In their initial statements to police, witnesses Hackney and Davis had failed to mention petitioner's name in connection with the Nelson killing (RT 1122, 2401). Witness Guidry, who named many participants in a supposed "death council" meeting occurring shortly before the killing, failed to name petitioner (RT 1580, 1591). Witness Pugh's testimony that petitioner had admitted participation in the "sticking" (RT 1920) was contradicted by Pugh's earlier statement suggesting that Hackney, and not petitioner, had done the "sticking" (RT 1993(i)). Pugh's claim that petitioner had threatened him (RT 2000–2001) was undermined by the testimony of witness Altizer who stated that he had written a death threat letter to Pugh at Pugh's request dictated by Pugh (RT 2194) and that Pugh had never suggested he was actually threatened by anyone (RT 2196). Pugh's taped interview indicated no threat from petitioner (RT 2027). Witness Stevenson testified that Pugh had stated that all he had to do was give some information about Browning—anything that would convict him—and he (Pugh) would be cut loose (RT 2208–2209).

[4] Such evidence, most of which was objected to as hearsay, was contained largely in the testimony of prosecution witness Guidry, Bell, Anjell and Pugh.

murder of William Cross;[5] the relationship between George Jackson, the BGF, and the Marin County Courthouse Shootout (RT 2376); the Black Muslim religious sect and the Zebra Killers of San Francisco (RT 2278, 2282, 2285, 2314–2318, 2828, 2830). The general atmosphere of fear and passion was enhanced by petitioner's being brought before the jury on one occasion in jailhouse whites, *see Estelle* v. *Williams,* 425 U.S. 501, 512–513 (1976), by the heavy courtroom security (RT 392–394, 2266, 2324), and by the admission of the autopsy photographs of Nelson's body (RT 588–592). Moreover, whatever the source of the racially volatile matter, its mere presence makes the exclusion of black people from petitioner's jury more egregious and the integrity of the jury's ultimate verdict more suspect.[6] In sum, while we may never know with certainty Anderson's true motives for so exercising his challenges, the speculation of Browning's trial counsel cannot be ruled out:

[5] The prosecution was permitted to go into this evidence to show a characteristic method, plan, or scheme on the part of co-defendant Browning (RT 1523, 1564). It had been stipulated that petitioner and co-defendants Tucker and Wyatt had *never* been in state prison, a jail term being the most severe prior sentence any of them had received (RT 2351, 2455, 2460).

[6] The injection of race as an issue at trial has often been the basis for the reversal of criminal convictions. *E.g., McFarlane* v. *Smith,* ___ F.2d ___ [26 Cr.L. 2208] (4th Cir. Oct. 29, 1979); *Kelly* v. *Stone,* 514 F.2d 18, 19 (9th Cir. 1975); *United States ex rel. Haynes* v. *McKendrick,* 481 F.2d 152, 157 (2d Cir. 1973); *People* v. *Bain,* 5 Cal.3d 839, 849 (1971). *See also People* v. *Johnson,* 77 Cal.App.3d 866, 873 (1978). Where all black prospective jurors have been excluded, the error is all the more unpalatable.

> "All right. The issue is Mr. Anderson's systematic exclusion. I will suggest to the Court that the reason for the systematic exclusion is that Mr. Anderson wants to make in his opening statement suggestions regarding the Black Guerrilla Family which will inflame an all-white jury, which black jurors could clearly see had no relevance to this case. And that is his real motive for excluding all the blacks from this case, because he intends to inflame all the whites which he has kept on the jury." (JST 900–901).

While petitioner agrees that the so-called "winking" behavior (JST 837) does not conclusively establish racial bias (Opp., p.5), that interpretation is consistent with the pattern of personal animosity and bias against the defendants exhibited throughout the trial by Anderson.[7] Whatever the significance of Anderson's behavior, it is hard to believe that in a case in which the prosecutor's animosity toward the defendant's was so visible throughout, his exercise of peremptory challenges *coincidentally* resulted in the defendant's experiencing the sting of the exclusion from the jury of sixteen members of their race.

Trial counsel *did* state that Anderson's attempt to justify the exclusion of blacks was a clear admission of systematic exclusion based on group bias (JST 898). Counsel's precise words were as follows:

[7] For example, during an early trial recess, Anderson was heard to say "Fuck you" to codefendant Browning (RT 1562); the court admonished Anderson not to speak to Browning in the future (RT 1563). During a subsequent recess, Anderson was heard saying to one of the defendants, "You come over here, you punk, and I'll drop you quick, you motherfucker." Browning's counsel merely stated, "The judge has ordered you not to speak to the defendants." (TR 2264).

"Frankly, Your Honor, my interpretation of what I just heard Mr. Anderson say is a clear admission that he systematically excluded blacks. Look, I have tried cases also, and I know full well that in choosing a jury you often go by gut instinct, and when Mr. Anderson has a clear gut instinct against men with beards or people from Berkeley, however much I may not like that, I have no quarrel with it because it is not a systematic exclusion prohibited by the United States Constitution. But when his gut instinct is that no black juror should sit on this case, for whatever reason, that is systematic exclusion prohibited by the United States Constitution in cases decided by the United States Supreme Court. . .

"Mr. Mintz made the argument very well yesterday about the last time he saw such a systematic exclusion of black jurors. I have tried a number of cases in this county for the last four years, not a very long time, but I have never seen such a blatent exclusion of black jurors. And Mr. Anderson has just confirmed what we have been saying. I don't know what else we could offer to this Court to prove systematic exclusion. And the only choice is simply that Mr. Anderson clearly has the right, if that is the ruling, to deny these defendants the right to have black jurors decide the case against them" (JST 898–899).

At the bottom line is one immutable fact which respondent cannot avoid: all sixteen black prospective jurors not challenged for cause were excluded by Anderson's exercise of peremptory challenges, resulting in petitioner's trial and conviction by an all-white jury. This record is more than ample to raise a *prima facie* case of violation of the Sixth and Fourteenth Amendments.

At the time the jury was selected, however, no remedy existed in California[8] or elsewhere[9] to either litigate or redress such violations. The trial court thus had neither an authorized procedure for determining whether such a violation existed nor an authorized remedy to redress it. This Court should fashion a procedure and remedy in order to provide badly needed guidance to courts and litigants alike.

II. Intervening Matter Not Available at the Time of Petitioner's Last Filing Underscores the Need for Guidance from this Court.

The recent reported decision in *People* v. *Lucero,* 99 Cal.App.3d ____ (2 Crim. No. 34938 Nov. 26, 1979), bears directly on the issues raised by the petition. There the California Court of Appeal, Second Appellate District, held that "the prosecutor's exercise of peremptory challenges to exclude all[10] Spanish-speaking prospective members from the jury constituted a violation of article I, section 16, of the California Constitution, and, in addition, constituted a violation of the Sixth Amendment to the United States Constitution." 99 Cal.App.3d at ____, Multilith Opinion at ____ (footnote added).

Justice Bernard Jefferson wrote in part as follows:

"Although the [*People* v.] *Wheeler* [22 Cal.3d 258 (1978)] court placed its holding strictly upon California state constitutional grounds, it recognized that such a holding is also required by the Sixth Amendment to the federal constitution . . .

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[8] *See People* v. *Wheeler,* 22 Cal.3d 258 (1978).

[9] *See Commonwealth* v. *Soares,* ____ Mass. ____, 1979 Mass.Adv.Sh. 593, 387 N.E.2d 499 (Mar. 8, 1979).

[10] "[E]ight or nine" such prospective jurors were so excluded. *Lucero, supra,* 99 Cal.App.3d at ____, Multilith Opinion at ____.

"The reason the *Wheeler* court placed its decision upon California state constitutional grounds rather than upon federal constitutional grounds related to the question of whether 'this pernicious practice'—of using peremptory challenges to exclude a well-defined segment of the community from the jury—had to be considered as constitutionally viable by reason of the case of *Swain* v. *Alabama* (1965) 380 U.S. 202. . . .

"We do not consider that *Swain* is either compelling or persuasive in terms of requiring a holding by us that the exercise of peremptory challenges in the case at bench did not constitute a violation of the defendant's right to a fair jury trial guaranteed by the Sixth Amendment to the United States Constitution. The *Swain* decision is not controlling because it adjudicated the issue involved in terms of whether the prosecutor's practice violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The *Swain* court did not consider at all whether such a practice of the prosecution constituted a violation of a defendant's right to an impartial jury guaranteed by the Sixth Amendment to the United States Constitution. Even though it is obvious that *Swain* does not compel a contrary holding to that reached by us in the case at bench, we do not consider *Swain* to be persuasive with respect to the Sixth Amendment issue."

Lucero, supra, 99 Cal.App.3d at ____, Multilith Opinion at ____ (footnotes omitted).

Lucero stands in direct conflict with the unpublished decision of the Court of Appeal in this case.

The recent decision in *United States* v. *Danzey,* 476 F.Supp. 1065 (E.D.N.Y. Oct. 3, 1979), is to the contrary.

There the District Court found that the prosecutor's exercise of peremptory challenges to exclude black prospective jurors did not violate the black defendant's right to due process of law under the Fifth Amendment or his right to an impartial jury under the Sixth Amendment. *Id.*, at 1067. The prosecutor had stated on the record that his sole basis for excluding black jurors was racial—*i.e.*, he said: "I make it a practice to attempt to exclude as best I can all jurors so that [*sic*] to exclude jurors of the same ethnic background as the defendant . . . I do that as a matter of course, no matter who the defendant is or whatever his ethnic background is." *Id.*, at 1066. The court concluded that the jury so selected was not unrepresentative, in part because "one black was selected for the jury after the prosecutor had exhausted his challenges." *Id.*, at 1067. It also concluded that "[s]o long as the *Swain* decision remains the law, the act of peremptorily challenging blacks is not impermissible." *Ibid.*

See also Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge,* 92 Harv. L.Rev. 1770 (1979), criticizing *Swain,* commending the decisions in *Wheeler* and *Soares,* but questioning whether the fair cross-section rule is the appropriate Sixth Amendment rationale on which to predicate relief.

CONCLUSION

Petitioner respectfully submits that the writ should issue.

Dated: December 21, 1979

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